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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

TIN FU CHEUNG,

Plaintiff and Appellant,

v.

TIMOTHY KER, M.D., et al.,

Defendants and Respondents.

B200625

(Los Angeles County
Super. Ct. No. GC036524)

APPEAL from judgments of the Superior Court of Los Angeles County,
Joseph F. DeVanon, Judge. Reversed.

Western Law Connection Corp. and Christopher G. Weston for Plaintiff and
Appellant.

Lewis Brisbois Bisgaard & Smith, Gregory G. Lynch, Matthew B. Stucky
and Jeffry A. Miller for Defendant and Respondent, Timothy Ker, M.D.

Fonda & Fraser, Sandra F. Winter and Kristen J. Heim for Defendant and
Respondent Alhambra Hospital Medical Center.

INTRODUCTION

Plaintiff Tin Fu Cheung appeals from the granting of summary judgments in favor of defendants Dr. Timothy Ker and Alhambra Hospital Medical Center (AHMC). Cheung sued Ker and AHMC for medical negligence and battery, alleging that defendants removed his right colon unnecessarily and without his informed consent. The trial court concluded that Ker provided undisputed expert evidence that he did not cause or contribute to plaintiff's injuries, and that Cheung failed to establish the existence of a triable issue of material fact regarding causation. We conclude that Ker did not adequately refute the causation element for purposes of summary judgment, and further that triable issues of material fact exist regarding whether Ker breached his duty of care, such that summary judgment should not have been granted. We therefore reverse the judgment in favor of Ker.

As to AHMC, we conclude that because it failed to address in its motion for summary judgment Cheung's theory of liability based upon the doctrine of respondeat superior, the judgment in its favor must also be reversed.

FACTUAL AND PROCEDURAL BACKGROUND

The Complaint

Cheung filed a complaint against Ker and AHMC alleging two causes of action: medical negligence and battery. In his medical negligence claim, Cheung alleged that defendants were negligent in their diagnosis and treatment of his condition. In particular, they misrepresented to him that he had a cancerous condition in his colon, convinced him that he must immediately have his colon removed, and failed to obtain his informed consent to the surgery. In truth, his colon was healthy and did not need to be removed. Defendant's conduct resulted in Cheung's colon being removed unnecessarily, and proximately caused Cheung

to suffer injury and damages. In his second cause of action, Cheung alleged that defendants removed his colon without his informed consent, and that such act constituted a battery. Cheung sought compensatory and punitive damages.

With respect to AHMC, Cheung further alleged that AHMC “employed, entrusted hospital facilities, and supervise[d] the other Defendants.”

The Motions for Summary Judgment

Both Ker and AHMS moved for summary judgment. We summarize the facts relevant to each motion.

1. Ker’s Motion For Summary Judgment

A. The Moving Papers

In his motion for summary judgment, Ker erroneously asserted that plaintiff’s complaint asserted only one cause of action against him: medical malpractice. The two grounds on which Ker sought summary judgment of that claim were that Ker complied with the standard of care in treating Cheung, and that Ker did not negligently cause or contribute to Cheung’s injuries.

In support of his motion, Ker relied on the declaration of an expert witness, Dr. Stephen Wilson. In his declaration, Wilson first summarized the course of Cheung’s treatment based on Wilson’s review of Cheung’s medical records. Wilson recounted that Cheung was first examined by Ker on December 17, 2004. He had been experiencing rectal bleeding, pain, and protrusion with bowel movements. Ker examined Cheung and found hemorrhoids. Ker performed a sigmoidoscopy, the findings of which were unremarkable. He diagnosed Cheung with hemorrhoids and rectal bleeding, and recommended that Cheung undergo rubber band ligation for the hemorrhoids and a colonoscopy. On that same day, Cheung signed an informed consent form for a colonoscopy with biopsy and

polypectomy. The colonoscopy was scheduled to take place on January 13, 2005. On January 10, 2005, Cheung executed a second informed consent form for a colonoscopy with biopsy and polypectomy.

On January 13, 2005, Ker performed a colonoscopy with right colon biopsy at AHMC. Ker saw along the entire length of the right ascending colon more than 30 sessile polyps (fleshy growths). Ker could not remove the polyps using the colonoscope. He took three biopsies of the polyps.

After the procedure, Ker told Cheung that he had more than 30 sessile polyps which could not be removed with the colonoscope. He recommended a right hemicolectomy (removal of the right colon). Ker documented that he discussed the risks, benefits and alternatives of surgery with both Cheung and his sister and they both understood and agreed to the surgery.

The pathologist, Dr. Edward Lai, examined the biopsied tissue on January 14, 2005, and found fragments of benign colonic mucosa displaying partial mild glandular hyperplasia suggestive of developing hyperplastic mucosal polyp of the colon, and no carcinoma or dysplasia.

On January 14, 2005, Cheung was admitted to AHMC, and Ker performed a right hemicolectomy. Upon inspection, the detached portion of the colon was observed to have about 30 sessile polyps ranging in size from 1 centimeter to 2.5 centimeters. The remainder of the colon was inspected and no other polyps were seen. Cheung tolerated the procedure without complication.

The pathologist, Lai, examined the right colon tissue and found more than 20 polypoid structures ranging in size from 0.5 centimeters to 5.0 centimeters. Lai sectioned through the polyps and found that all of them contained air bubbles beneath the mucosal surface. He found no areas of ulceration. He found only a few small recognizable soft lymph nodules in the attached adipose tissues. Lai's diagnosis after microscopic examination was (1) pneumatosis cystoides coli; (2)

many cystic structures lined by a layer of mucin producing columnar epithelial cells in the submucosa and presence of many multinucleated giant cells on the surface of the cystic wall; (3) a few small foci of hemorrhage in the mucosa and submucosa; (4) no carcinoma or true mucosal polyp in any of the sections; and (5) no evidence of malignancy.

Cheung remained at AHMC until January 21, 2005, when he was discharged with instructions to follow up with Ker in one week. Cheung was seen by Ker on January 26, 2005 for a post-operative evaluation. Cheung reported having five bowel movements a day, and Ker recommended that Cheung undergo an esophagogastroduodenoscopy (EGD), an endoscopic procedure used to visualize the upper part of the gastrointestinal tract up to the duodenum. Cheung saw Ker again on March 21, 2005, and complained of abdominal pain. Ker recommended Tylenol and an EGD, but Cheung declined the EGD, saying that he did not have time.

Based on the foregoing summary of Cheung's treatment, Wilson opined "to a degree of reasonable medical probability," that Ker acted appropriately and within the standard of care in removing Cheung's right ascending colon given the history of rectal bleeding associated with pain and the findings on the colonoscopy of 30 sessile polyps. Ker noted the polyps could not be removed safely and effectively with the colonoscope. Removal of what appeared to be colon polyps from Cheung would reduce the risk of colon cancer. Polyps of 2 centimeters or larger carry a 20 percent chance of becoming cancerous. The 30 polyps seen by Ker with the colonoscope ranged in size from 1.5 centimeters to 2.0 centimeters. Wilson opined that the treatment rendered to Cheung by Ker satisfied the standards of professional care for colorectal surgeons in the Southern California community in 2005. Wilson further opined that Ker did not cause or contribute to Cheung's injuries.

B. Cheung's Opposition Papers

In opposing Ker's motion, Cheung pointed out that he had asserted two causes of action against Ker: medical malpractice and intentional tort (battery). His evidence in opposition consisted of his own declaration, and that of Dr. Joseph A. Scoma, his expert witness.

In his declaration, Cheung stated that after Ker obtained the colonoscopy pictures, Ker told Cheung the pictures showed polyps which were precancerous and that an immediate surgery to remove the polyps was necessary. Ker had already scheduled the surgery for 6:00 a.m. the following morning, instructing Cheung to return to Ker's office that afternoon to pick up the pre-surgery prescription, which consisted of antibiotics and a laxative. Cheung was "completely uncomfortable as a result of Dr. Ker's 'quickie' diagnosis of [his] alleged cancerous condition, in addition to the fact that the upcoming procedure seemed so invasive," and Cheung therefore sought out Ker for further discussion. Ker reiterated his prior comments concerning the polyps and how they were cancerous, and that Cheung needed immediate surgery. Ker did not discuss advantages and disadvantages of the surgery, or inform him of any alternative treatments.

Preparation for the surgery required fasting, making it the second day that Cheung was unable to eat, leaving him feeling weak, frail, and in poor health. The morning of the surgery he felt sick and unaware of his surroundings and as a result, he has no recollection of signing the surgery authorization form. If he did sign the form, he only did so as a result of Ker's assurances that he did in fact have cancer, as otherwise he would have never consented to such invasive and immediate treatment.

His sister, Li Zeng, asked Ker about the biopsy results. Ker told her the biopsy was only performed on three of the more than 30 polyps and that regardless of the biopsy results, the surgery would be necessary. Ker said the results were unimportant and the surgery was needed either way.

A few days after the surgery, Ker congratulated Cheung that the pathology report showed that he had no cancer. To confirm that statement, Cheung had his sister call Lai, the pathologist at AHMC. He told Zeng that the polyps were in fact air bubbles and that the surgery was completely unnecessary.

Cheung stated that as a result of the unnecessary and harmful surgery, he has no control over his bowels and endures uncomfortable and embarrassing episodes on a daily basis. His condition has made it nearly impossible to engage in intimate sexual conduct. He suffers from anxiety and emotional trauma as well as terrible physical problems.

Dr. Scoma, in his declaration, stated that he had reviewed Cheung's medical records. He opined that Ker was negligent and failed to meet the applicable standard of care in the medical community with regard to Cheung's treatment. Scoma stated that the pathology report from the colonoscopy indicated that there was no carcinoma or dysplasia in any of the polyps that were biopsied, and they were not adenomatous polyps which are considered premalignant. Cheung was immediately scheduled for a colon resection and underwent the extensive operative procedure. The post-operative pathology report indicated that the numerous polyps in the colon were all benign. They were diagnosed as pneumatosis cystoids coli including many cystic structures which were mucin producing, indicating that these were totally benign polyps. They do not become carcinoma. There was no suggestion of any carcinoma and these polyps can be either removed by biopsy forceps or more likely just left alone once the pathology report is obtained. Scoma opined that the management of Cheung and the removal of his right colon was

below the standard of care and “[was] essentially negligence.” “Certainly the surgeon should have awaited the pathology report[, which] should have been reviewed and the surgery should never have been performed.”

C. Ker’s Reply Papers

Ker asserted in his reply memorandum of points and authorities that he had satisfied his initial burden on summary judgment because the Wilson declaration sufficiently set forth reasoned explanations for his opinions. Specifically, Wilson stated that it was appropriate to remove the polyps because it reduced Cheung’s risk of developing colon cancer. Ker further asserted that Scoma failed to set forth any opinion on the element of causation. Finally, Ker pointed out that, based on Cheung’s failure to timely respond to requests for admission, the trial court had ordered that Cheung would be deemed to have admitted that he had no facts to support his contention that Ker was negligent in his care and treatment, or that Ker negligently caused or contributed to any injury to Cheung.

2. AHMC’s Motion For Summary Judgment

A. AHMC’s Moving Papers

In its separate statement of undisputed material facts, AHMC briefly outlined the course of events that culminated in Cheung’s undergoing a hemicolectomy and being discharged from AHMC on January 21, 2005. It asserted as an undisputed fact that the care and treatment rendered to Cheung by the nursing staff at AHMC complied with the standard of care in the community. The nursing staff kept him under continual observation and evaluation, constantly monitored him at appropriate intervals, kept his physicians apprised of his condition, and carried out the orders given to them. In support of these assertions,

AHMC submitted a declaration from Susan Zavala, a registered nurse with a certification in critical care nursing.

B. Cheung's Opposition

In opposition, Cheung stated that the claim against AHMC did not primarily concern the standard of care provided by the nursing staff, but instead concerned the hospital's negligence in employing Ker and facilitating the unnecessary surgery.

C. AHMC's Reply

In its reply to the opposition to its motion for summary judgment, AHMC did not dispute that it employed Ker. In a footnote, AHMC noted that plaintiff's expert did not "state that the hospital negligently 'employed' a purportedly negligent Dr. Ker." In addition, as a result of Ker's requests for admission that by virtue of request for admissions having been deemed admitted, it had been established that Ker was not negligent in his care and treatment of plaintiff.

Cheung's Motion to Amend or Withdraw His Responses to Requests for Admission

As we have noted, in their reply papers, Ker and AHMS relied in part on a prior order of the trial court deeming Cheung to have admitted that he had no facts to support his contention that Ker was negligent in his care and treatment, or that Ker negligently caused or contributed to any injury to Cheung. Cheung moved to amend or withdraw his responses to the requests for admission submitted to him by Ker, on the basis that the admissions were the result of mistake, inadvertence or excusable neglect. Cheung pointed out that he had served on Ker and AHMC his responses before the hearing date on Ker's motion to deem admitted the relevant matters. Initially, hearing on Cheung's motion was set for June 5, 2007, several

days after the hearing was scheduled to take place on the motions for summary judgment. However, Cheung filed an ex parte application seeking an order to shorten time for service and to set the hearing on the motion for a time before the hearing on the motion for summary judgment.

The Court's Rulings on the Motions for Summary Judgment

At the hearing on the motions for summary judgment, Cheung's counsel argued that Scoma's declaration had raised triable issues of material fact regarding Ker's negligence in treating Cheung by removing his colon without having the biopsy report. As to causation, counsel argued that Ker's unnecessary removal of Cheung's colon obviously caused Cheung's damages. Counsel pointed out that he had filed a motion to amend or withdraw Cheung's responses to the requests for admission, which had not yet been decided.

Counsel for Ker stated that the matters deemed admitted did not form a basis for Ker's motion for summary judgment. To the extent that Ker mentioned the admissions in his reply papers, counsel withdrew those references and opted to "just focus on the causation." Counsel argued that Cheung's expert declaration by Scoma offered an opinion on the standard of care having been breached by removal of Cheung's colon, but Scoma did not address whether it caused Cheung any injury in this case. Counsel argued that the only way to remove the polyps was by performing the surgery to remove the entire right colon, and Scoma did not address whether alternative treatments were available to remove the polyps.

Cheung's counsel responded that Cheung's argument was that it was entirely unnecessary to remove the colon.

The trial court took the matter under submission.

At a subsequent hearing, the court stated that both defendants' motions for summary judgment would be granted. The court noted that consideration of the

matters deemed admitted was not necessary for the court to grant Ker's motion for summary judgment. The court nonetheless granted the relief requested by Cheung to amend or withdraw the prior admissions.

Thereafter, the court issued a minute order stating that Ker had "provided undisputed expert evidence that to a reasonable degree of medical probability he did not cause or contribute to plaintiff's injuries. Plaintiff has provided no evidence to establish the existence of a triable material fact."

The court then entered separate judgments in favor of AHMC and Ker. This timely appeal followed.

DISCUSSION

"Generally, '[a] defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail. [Citation.]' (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) The defendant may carry this burden by showing 'that the plaintiff cannot establish at least one element of the cause of action--for example, that the plaintiff cannot prove element X.' (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 (*Aguilar*).) The defendant need not 'conclusively negate' the element; all that is required is a showing 'that the plaintiff does not possess, and cannot reasonably obtain, needed evidence.' (*Id.* at pp. 853-854.)" (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1176.)

"The elements of a medical malpractice claim are: ""(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence.'

[Citation.]” (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606.)” (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 468, fn. 2.)

“Following a grant of summary judgment, we review the record de novo for the existence of triable issues, and consider the evidence submitted in connection with the motion, with the exception of evidence to which objections were made and sustained. (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334.)” (*Wall Street Network, Ltd. v. New York Times Co.*, *supra*, 164 Cal.App.4th at p. 1176.)

I. Defendant Ker’s Motion for Summary Judgment

A. Medical Negligence

1. Causation

In granting summary judgment, the trial court concluded that Ker had “provided undisputed expert evidence that . . . he did not cause or contribute to plaintiff’s injuries,” and Cheung did not provide evidence to establish the existence of a triable issue of material fact. The expert evidence provided by Ker was Wilson’s statement in his declaration – without elaboration -- that in his opinion Ker did not cause or contribute to Cheung’s injuries and damages. We conclude that this evidence was insufficient to warrant the granting of summary judgment.

“‘[T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; *if he carries his burden of production*, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.’ (*Aguilar, supra*, 25 Cal.4th at p. 850.)” (*Wall Street Network, Ltd. v. New York Times Co.*, *supra*, 164 Cal.App.4th at p. 1176, fn. 2, italics added.) Wilson’s opinion that Ker did not cause or contribute to Cheung’s injuries and damages did not constitute a prima facie showing on the issue of causation.

In his complaint, Cheung alleged that Ker unnecessarily removed his colon – that is, removal of the colon (as well as the resultant effects) *was* the injury over which Cheung was suing. There was no dispute that Ker removed Cheung’s right colon. Thus, there was no dispute that Ker caused the injury of which Cheung complained. Wilson’s bare assertion, without any explanation, that Ker did not cause or contribute to Cheung’s injuries did not create a triable issue whether Ker injured Cheung by removing his colon. In substance, the only issue Wilson addressed was whether Ker’s removal of Cheung’s colon was negligent. (*Avivi v. Centro Medico Urgente Medical Center, supra*, 159 Cal.App.4th at p. 468.) Thus, summary judgment could not be granted on the basis of Cheung’s alleged failure to produce evidence proving Ker’s conduct caused his injuries and damages.

“On appeal, we are concerned with the validity of the summary judgment ruling, not its reasoning.” (*United Services Automobile Assn. v. Baggett* (1989) 209 Cal.App.3d 1387, 1391.) Accordingly, we address whether this court may affirm the trial court’s summary judgment in favor of Ker on alternative grounds, namely whether triable issues of material fact exist regarding Ker’s breach of duty.

2. *Breach of Duty*

a. *Negligent Diagnosis and Treatment Resulting in Injury*

In support of his motion for summary judgment, Ker presented evidence in the form of Wilson’s declaration stating that Ker did not breach his duty of care to Cheung. Wilson reviewed the medical records and opined that given the circumstances Ker’s decision to remove Cheung’s right colon was within the applicable standard of care in the medical community. This showing sufficed to shift the burden of production to Cheung to make a *prima facie* showing of the existence of a triable issue of material fact.

In opposition, Cheung produced Scoma's declaration which stated that Ker should have waited for the results from the first biopsies he took during the colonoscopy, which showed that the polyps were not precancerous or cancerous, before performing the right hemicolectomy. In Scoma's opinion, removal of the right colon was in fact unnecessary and the polyps could have been left in place without harm or risk of developing cancer. This evidence constituted a prima facie showing that a triable issue of material fact existed regarding whether Ker breached the standard of care by removing Cheung's right colon.¹ Thus, summary judgment could not be granted in favor of Ker on this basis.

b. *Failure to Obtain Informed Consent*

In his respondent's brief on appeal, Ker discusses the theory advanced in Cheung's complaint that Ker was negligent in failing to obtain Cheung's informed consent before performing the surgery because he told Cheung that the polyps were cancerous. Because we reverse the grant of summary judgment on the basis that triable issues of material fact exist as to whether Ker was negligent in his diagnosis and treatment of Cheung, and because Ker did not move in the alternative for summary adjudication of any issue relating to Cheung's informed consent, we need not separately address the validity of the Cheung's lack-of-informed-consent theory of negligence. (See *White Motor Corp. v. Teresinski* (1989) 214 Cal.App.3d 754, 764, fn. 17 (*White*) [court cannot grant summary

¹

We note that Cheung stated in his declaration that prior to the surgery being performed, his sister asked Ker about the biopsy results from the colonoscopy. Ker said that biopsies were performed on only three of the polyps, and regardless of the biopsy results, the surgery would be necessary. The record does not contain additional evidence regarding this purported statement, or regarding the validity of this medical decision. We conclude that triable issues of material fact remain and preclude the granting of summary judgment.

adjudication of issue not raised in motion]; see also Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) § 10:88, p. 10-32.)

B. Battery

In moving for summary judgment, Ker did not address Cheung's cause of action for battery. Ker argues on appeal that his summary judgment motion necessarily challenged the legal sufficiency of Cheung's battery cause of action. However, because Ker did not move in the alternative for summary adjudication of any issues related to the battery claim (and indeed did not address the battery claim at all), we will not address the battery claim on appeal. (See *White, supra*, 214 Cal.App.3d at p. 764, fn. 17.)

II. Defendant AHMC's Motion for Summary Judgment

Cheung alleged in his complaint, in part, that AHMC employed Ker. In its motion for summary judgment, however, AHMC did not seek to refute the existence of an employment relationship between Ker and AHMC. The sole ground on which it sought summary judgment was "that the care and treatment its nursing staff rendered to plaintiff . . . complied with the standard of care in the community."

"A hospital's duty to exercise that degree of care, skill, and diligence exercised by other hospitals in the general community includes the employment of reasonably competent personnel. Thus, a hospital may be liable for injury to a patient that is caused by the negligent conduct of the hospital's employees, under the principles of either respondeat superior or corporate negligence." (36A Cal.Jur.3d, Healing Arts and Institutions, database updated Apr. 2008, § 480, fns. omitted.) "[A] nurse or physician may be the servant of a hospital, thus requiring the application of the doctrine of respondeat superior even though they are

performing professional acts.” (*Rice v. California Lutheran Hospital* (1945) 27 Cal.2d 296, 304.)

Because AHMC failed to establish that no triable issue of material fact existed regarding its liability under the doctrine of respondeat superior, summary judgment could not be granted in its favor.

DISPOSITION

The judgments in favor of Ker and AHMC are reversed, and the matter is remanded to the trial court for further proceedings. Costs on appeal are awarded to Cheung.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.